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No. 79-1456

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRUEHAUF CORPORATION, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
VELLA M. FINK
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20506

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-5) is reported at 609 F. 2d 434. The district court's findings of fact and conclusions of law (Pet. App. A-1 to A-13) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1979. A petition for rehearing was denied on December 26, 1979 (Pet. App. C-1). The petition for a writ of certiorari was filed on March 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly reversed an award of attorneys' fees against plaintiff Equal Employment Opportunity Commission on the ground that the record did not support the district court's finding that the action was frivolous and motivated by bad faith.

STATEMENT

In this employment discrimination action, the Equal Employment Opportunity Commission charged that petitioner's refusal to promote blacks to the position of foreman at its Oklahoma City facility violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The action arose from charges filed with the Commission by two black employees who alleged that petitioner did not promote them because of their race. Prior to suit, an experienced EEOC investigator, who had previously investigated between 250 and 300 charges, interviewed the charging parties and reviewed petitioner's answers to certain interrogatories. The investigator then conducted a three-hour on-site investigation of petitioner's Oklahoma City facility in which he deposed the branch manager and interviewed other personnel. Based on this investigation, the Commission issued a detailed decision finding reasonable cause to believe that the charges of discrimination were true. After unsuccessful conciliation efforts, the Commission filed this suit (Pet. App. B-1 to B-3).

The evidence presented by the Commission at trial established that there had been twelve vacancies for the position of foreman at the Oklahoma City facility since 1965, and that all of these vacancies had been filled by whites (Pet. App. A-4, B-5).[1] The Commission's evidence

[1]One foreman was part American Indian (Pet. App. A-4).

further showed that three black mechanics had consistently been passed over as candidates for the foreman position even though each had been employed by petitioner for a considerable length of time (Pet. App. B-5). Finally, the Commission also demonstrated that the foreman was selected by petitioner's branch manager and branch service manager, who at all relevant times were white, and that the selection of a foreman required subjective judgments on their part (*id.* at A-2 to A-3, A-4, A-10).

Following the close of trial, the district court entered judgment for petitioner on the ground that the Commission had failed to prove that the three black mechanics had applied for or were qualified to hold the position of foreman (Pet. App. A-12). In addition, the district court determined that the EEOC's investigation was "sketchy" and "discriminatory, in and of itself," because the Commission's investigator was black, thereby "requiring blacks to determine discrimination against other blacks by whites" (*id.* at A-11). On that basis, the court concluded that the suit "was not in good faith and was frivolous in its inception" (*id.* at A-12), and it therefore ordered the plaintiff Commission to pay petitioner $25,000 in costs and attorneys' fees (*id.* at A-14).

The court of appeals affirmed the district court's decision on the merits, but reversed the award of attorneys' fees as an abuse of discretion under *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). Noting that the "[i]nvestigation of the complaints was made in due course and in the usual manner" (Pet. App. B-5), the court of appeals found that "[t]here is nothing in the record * * * to support the trial court's finding that the

action was frivolous from its inception, or that in prosecuting the action EEOC was motivated by something other than good faith * * *" (*ibid.*).

ARGUMENT

In reversing the award of attorneys' fees to petitioner as the prevailing defendant in this Title VII suit, the court of appeals correctly applied the standard set forth by this Court in *Christiansburg Garment Co.* v. *Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), and further review is unwarranted.

In *Christiansburg*, the Court made clear that "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." 434 U.S. at 422. Although the district court in this case anticipated the legal standard subsequently adopted in *Christiansburg*, the court of appeals correctly reversed, for lack of support in the record, the district court's determination "that the action was frivolous from its inception, or that in prosecuting the action [respondent] was motivated by * * * bad faith" (Pet. App. B-5).

As the court of appeals observed, the evidence established that "[n]o black had ever served as a shop foreman at [petitioner's Oklahoma City facility], though several had served as mechanics for a considerable length of time" (Pet. App. B-5). This situation existed despite the fact that petitioner had twelve vacancies in the foreman position since 1965 (*id.* at A-4). Moreover, the court of appeals noted that the complaints filed by petitioner's employees had been investigated by the Commission "in due course and in the usual manner" (*id.* at B-5) by an

experienced EEOC investigator who interviewed the complainants, reviewed petitioner's answers to interrogatories, conducted an on-the-site investigation, and deposed petitioner's branch manager (Pet. App. B-2 to B-3). In these circumstances, the court of appeals properly concluded that this case did not fall within the *Christiansburg* standard.[2]

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[2]Contrary to petitioner's contention (Pet. 7), the court of appeals did not use a subjective test of bad faith in reversing the award of attorneys' fees. Rather, it held that the district court's finding that the Commission had acted in bad faith was unsupported (Pet. App. B-5).

Moreover, there is not, as petitioner asserts (Pet. 6-7), a conflict among the circuits concerning the proper application of *Christiansburg*. Many of the decisions cited by petitioner simply involved the application of an accepted legal standard to the particular circumstances in each case. See *Faraci* v. *Hickey-Freeman Co.*, 607 F. 2d 1025 (2d Cir. 1979); *Bowers* v. *Kraft Foods Corp.*, 606 F. 2d 816 (8th Cir. 1979); *Olitsky* v. *O'Malley*, 597 F. 2d 303 (1st Cir. 1979); *Equal Employment Opportunity Commission* v. *First Alabama Bank of Montgomery*, 595 F. 2d 1050 (5th Cir. 1979); *Middleton* v. *Remington Arms Co.*, 594 F. 2d 1210 (8th Cir. 1979); *Prate* v. *Freedman*, 583 F. 2d 42 (2d Cir. 1978); *Hughes* v. *Repko*, 578 F. 2d 483 (3d Cir. 1978). Indeed, as in this case, the court of appeals in *Bowers* and *Middleton* set aside the district courts' awards of attorneys' fees under *Christiansburg*. The other decisions on which petitioner relies merely remanded the issue of attorneys' fees because the district court had not, in awarding fees prior to *Christiansburg*, followed the standard subsequently adopted by this Court. See *Tillman* v. *Wheaton-Haven Recreation Ass'n*, 580 F. 2d 1222 (4th Cir. 1978); *Lopez* v. *Arkansas County Independent School District*, 570 F. 2d 541 (5th Cir. 1978); *Equal Employment Opportunity Commission* v. *Datapoint Corp.*, 570 F. 2d 1264 (5th Cir. 1978). In the instant case, such a remand for further consideration is unnecessary because, as petitioner acknowledges (Pet. 8), the district court's ruling anticipated the later decision in *Christiansburg*.

Petitioner argues (Pet. 11-12), however, that because some of the evidence presented at trial, much of which was accumulated after the EEOC's investigation, indicated that the black mechanics may have been unqualified, the Commission should have concluded that its claims were without foundation and voluntarily dismissed the suit. However, as recognized in *Olitsky* v. *O'Malley*, 597 F. 2d 303, 305-306 (1st Cir. 1979), this assertion does not show "that the suit was brought in bad faith * * *. [V]oluntary dismissal is, except in unusual circumstances, almost alien to our adversary system." Moreover, petitioner advances precisely the kind of "hindsight logic" that the Court has condemned in admonishing "district court[s to] resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg*, *supra*, 434 U.S. at 421-422. In light of this principle, the court of appeals correctly held that although petitioner was eventually successful in proving that none of the experienced black mechanics in its employ was qualified to be a foreman, the EEOC had a reasonable basis for prosecuting this action (Pet. App. B-5).[3]

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[3]The suggestion of the district court (Pet. App. A-11) and of petitioner (Pet. 13-14) that the Commission should impose racial qualifications in the employment or assignment of investigators is frivolous. There is no evidence or finding of bias or impropriety on the part of the investigator here. Nor does the district court or petitioner suggest what would have been the proper race for the investigator in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
VELLA M. FINK
Attorneys
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